IN THE

Supreme Court of the United States

October Term, 1923

No. [redacted]74

MAX M. HOROWITZ,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This is an appeal from a judgment of the Court of Claims sustaining a demurrer to a petition which alleged that on December 22, 1919, the Government sold the appellant about $75,000 worth of silk and it was agreed that the appellant should pay part of the pur-

chase price in cash and the remainder was to be paid when ordered to ship silk and it was part of the contract that time, when the shipment was ordered, was to be of the essence of the contract, and that the Government would ship the silk within a day or two after shipping instructions. The Government officers also knowing that the price of silk changed very rapidly.

Notice was given the appellee February 10, 1920, that shipping instructions would be given and the balance paid within a few days as agreed. This notice being to enable the Government to take preparatory steps for shipping the silk and on February 16 the appellant paid the balance of the purchase price pursuant to the contract and instructed the Government to ship the silk to Cambridge Silk Company, of New York, by freight, collect, and was promised by the Government officers that it would be shipped on the 16th or 17th and on the 18th the officers notified the appellant that they had shipped the silk.

The Government Officers knew that time was the essence of appellant's contract of resale and that there must be prompt delivery as the market fluctuated rapidly.

The silk not arriving the appellant began phoning, writing, and telegraphing from New York to Washington and was not able to learn until March 4 that the silk had not been shipped but was still in Washington, and he was given as an excuse by the Government for non-shipment that there had been placed an embargo prior to March 1, 1920. Thereupon the appellant urged the Government to ship the silk at once by freight or express but it did not do so until about March 10 or 11 and it arrived in New York by express March 12. In the meantime the price of silk had decreased so extensively that appellant's purchaser refused to accept the silk.

ASSIGNMENTS OF ERROR

The Court Erred:

1. In holding no cause of action alleged, and sustaining the demurrer.
2. In holding the principles discussed in Deming's case govern as an Embargo is not a statute, but if equivalent to a statute it is unconstitutional as impairing a contract, and it expired as a Government Regulation on March 1, 1920.
3. In holding that the embargo relieved appellee from performing its agreement, especially as it is not alleged the embargo was effective February 16th or 17th.
4. In holding the embargo relieved appellee as there was no clause in the contract so relieving appellee, and the Court put the Government on a different basis from a private contractor.
5. In holding appellant not entitled to recover for damages arising under a regulation.
6. In holding there was not a temporary "Taking" of the silk to enable the Government to handle other freight to its advantage as a common carrier.

ARGUMENT

1. First Assignment of Error: Time was the essence of this contract and the appellant was told February 18 that the silk had been shipped when the fact is it had not and it was alleged (p. 3, par. 7) that the contract was breached on March 4, 1920, the silk having not then been shipped and was not shipped for some six or seven days later and this date March 4 was four days after the termination of the embargo as a Government regulation.

The railroads having been returned to their private owners on March 1, on an order issued by the President several months prior thereto all Government embargoes and regulations ceased on March 1, 1920, as Government regulations and embargoes.

There is no allegation that the embargo applied to or covered Government shipment of the silk or that it prevented the shipment of the silk and in the absence of such an allegation that this embargo applies, it is a matter of defense to be set up in answer.

On all the allegations taken together it is clear that the allegation as to the embargo was merely a statement of an excuse given by the Government, and was not the real reason, for the failure and neglect to ship the silk was the alleged reason of the breach.

The Government having sold the silk, accepted the money and agreed in its sale, that time was the essence of the contract as to delivery when shipping orders were given and knowing that appellant's resale provided for and depended on prompt shipment and delivery, deliberately failed and refused for nearly a month to ship the silk.

In the United States Fidelity Guaranty Company vs. U. S. 53 Ct. Cls. 561 the Court held that where the Government agreed to furnish material it was liable for damages for its dalays and non-compliance.

And again in Hummel, Trustee, vs. United States, 58 Ct. Cls. —, the Court held that where the Government sold materials that it owned to citizens and instead of shipping the material to the purchaser shipped it elsewhere, the Government is liable for the difference between the contract price and the market price at the time of the breach, citing Roberts vs. Benjamin, 124 U. S. 64; March vs. McPherson, 105 U. S. 709; Ralli vs. Rockmore, 111 Fed. 875.

In time of war there can be no embargo placed on any Government shipment, but there can be an embargo giving Government shipments priority, and in time of peace shipments consigned to agents of the United States shall have preference anl shall not be affected by any embargo. I. C. C. Act; 34 Stat. L. 584, Sec. 6. par. 8; 39 Stat. L. 604.

It was still "time of war" when this shipment was directed as the resolution declaring the war ended had not been passed.

Any regulation or embargo in conflict with a statute is invalid and void (U. S. vs. Symond, 120 U. S. 46; 7 Sup. Ct. 411; Gulf Transit Company vs. U. S. 43 Ct. Cls., 183), and the embargo offered as an excuse is invalid if it pretends to affect the shipment involved in this suit.

In U. S. vs. Speed, 8 Wall. 85, 75 U. S. 453, the Court said:

> "Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs requires an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant."

2. Second Assignment of Error: The Deming case, 1 Ct. Cls., 190, is not applicable to this case because in that case there were two contracts involved for furnishing rations; under the first contract for furnishing rations in 1861 there was imposed a duty on part of

the rations, the act being passed after signing the contract and the rations bought by the contractor after the passage of the act; in the contract for 1862 the legal tender act was passed after the signing of the contract but before any deliveries of rations and the contractor delivered the rations, accepted pay in legal tender and sued, not on the contract or violation thereof, but on a Quantum Meruit. Thus it will be seen that the contractor went ahead after the passage of the acts by Congress and performed his contracts.

In Wilson's case, 11 Ct. Cls., 513, relied on by the appellee, the contractor had agreed to sell mules to the Government and he arrived at the army outpost at Washington too late in the evening to be admitted that night under the Martial Law then in effect and before the time for admission the next morning the mules were captured by the Confederates; here the Government did not get any benefit whatever, and the contractor never performed his contract; he didn't even make a tender of delivery at the point where he had to deliver; he took the risk of coming through the enemy's country with the mules and the Court stated:

> "The damages at most would be limited to the direct expense occasion by such delays" (p. 522) following Grant vs. U. S. 7 Wall. 331.

In the present case the appellant had fully performed his contract, *paid all the money,* the Government getting full benefit, and had been informed that the Government had shipped the silk on February 18.

The embargo or Government regulation under Federal Control of Railroads expired on the termination of Federal Control on March 1, 1920.

Article 1, Section 10, of the constitution prohibits any law impairing the obligation of contracts and

clearly under that section there could not be a valid regulation of the Government which impaired the obligation of the contract.

3. Third Assignment of Error: There is no allegation that the embargo was the real cause of the Government breach of contract, the allegation being that the appellant merely learned that it was one excuse given by the Government.

There being no allegations that the embargo was effective February 18, and the Government officers having informed the appellant that the silk had been shipped, which was a false statement that lulled the appellant and caused him to wait and rely on the false statement that the silk had been shipped, entitles the appellant to recover because of the deceit and the violation of the agreement.

In Freund vs. U. S. 262 U. S. —; 43 Sup. Ct. 76, the Court held that mail contractors, who, after bidding on a contract and executing the contract, were compelled to accept a different and more burdensome route, which under the contract the department was not authorized to substitute, were entitled to recover the reasonable value of their services, including a fair profit. In Chas. Nelson vs. U. S., 43 Sup. Ct. at 303, the Court approved the Freund case above and stated that it involved conduct of questionable fairness on the part of the Government officers towards the contractor.

4. Fourth Assignment of Error: Private parties are not relieved from performance of contracts on account of an embargo unless they are specifically released therefrom by a clause in the contract.

The Government is bound by the same rules as to contract as are applicable to contracts between private parties as held by this Court in Mason & Hangar vs. United States, 262 U. S. —; 43 Sup. Ct. 128 at 129.

The Courts must apply on Government contracts the ordinary principles of contracts. Smoot's case, 15 Wall. at 45.

A party is not excused from performing his contract where a *changed law* merely makes *performance more burdensome.* N. N. etc. Co. vs. McDonald Brick Co., 109 Ky. 408; 59 S. W. 332; Cowan vs. Meyer, 125 Md. 450; 94 Att. 18; Baker vs. Johnson, 42 N. Y. 126.

5. Fifth Assignment of Error: Congress provided in the act for damages arising under regulations of the Department to be recovered in the Court of Claims and it was thereby clearly the intention of Congress that the Government should not be relieved from liability for violating or terminating a contract by a regulation, Gulf Transit Co. vs. U. S. 43 Ct. Cls. 183, Maddox vs. U. S., 20 Ct. Cls. 193.

In the instant case the Government sold the silk to the plaintiff and accepted his money and agreed to deliver the goods and told him that they had been delivered when in fact they were withheld without his knowledge until he was damaged. The Government officers knew that time was the essence of the plaintiff's contract. If the Court should hold that the embargo was a valid regulation and effective to prevent the shipment of the silk and that the Government should not have shipped it by express then under the above cases the appellant is entitled to recover his damages, as damages arising under a regulation.

6. Sixth Assignment of Error: See U. S. vs. Russell, 13 Wall. 623, where it was held that the *temporary* taking of personal property makes the Government liable for the damages during the time the property was held by the Government and used to its benefit.

In U. S. vs. Rogers et al., 255 U. S. 163, 41 Sup. Ct. 281, 65 L. Ed. 566, Mr. Justice Day said:

> "Having taken lands of the defendants in error, it was the duty of the Government to make just compensation as of the *time* when the owners *were deprived* of their property," citing Monongahela Navigation Co. vs. U. S., 147 U. S. 341, 13 Sup. Ct. 622.

The Court of Claims itself in Peabody vs. United States, 43 Ct. Cls. at page 16 (after a rehearing 46 Ct. Cls. 39 was affirmed 231 U. S. 520, 34 Sup. Ct. 159), has said:

> "Property has been well defined to be a person's right to possess, *use, enjoy,* and *dispose* of a thing not inconsistent with the law of the land," citing 1 Lewis Eminent Domain, Sec. 54-58.

We find in 1 Nichols (2nd ed.) Eminent Domain, 336: "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of *right or interest capable of being enjoyed* as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and *intangible,* incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds: "Intangible property such as choses in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this sovereign authority (the power of eminent domain) as fully as land or other tangible property." This is nearly an exact quotation from Mr. Justice Lurton in Cincinnati vs. Louisville & Nashville Ry. Co., 223 U. S. 390 at 400; 32 Sup. Ct., 267.

The embargo or Government regulation if valid and effective as to this silk shipment was a temporary "taking" of the silk of the appellant, and it was in violation of his constitutional right, for when defining *constitutional liberty,* this Court said in Myer vs. Nebraska, 43 Sup. Ct. at 626; 260 U. S. —:

> "While this Court has not attempted to define with exactness the liberty thus granted, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the *right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

And again at 627:

> "The established doctrine is that *this liberty* may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislative power is not final or conclusive but is subject to supervision by the Courts. Lawton vs. Steele, 152 U. S. 133, 137; 14 Sup. Ct., 499; 38 L. Ed. 385."

In Terrace vs. Thompson, 44 Sup. Ct. 17 at 18, 262 U. S. —, Mr. Justice Butler said:

"The Terraces' property rights in the land include the right to *use, lease,* and *dispose of it for lawful purposes* (Buchanan vs. Warley, 245 U. S. 60, 74; 38 Sup. Ct. 16; 62 L. Ed. 149, L. R. A. 1918C, 210 Ann. Cas. 1918A, 1201) and the Constitution protects these essential attributes of property (Holden vs. Hardy, 169 U. S. 366, 391, 18 Sup. Ct. 383, 42 L. Ed. 780) and also protects Nakatsuka in his right to earn a livelihood by following the ordinary occupations of life (Truas vs. Raich, supra; Meyer vs. State of Nebraska, 261 U. S. —, 43 Sup. Ct. 625, 67 L. Ed. —). If, as claimed, the State act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer and the threat to enforce it *constitutes a continuing unlawful restriting upon and infringement of the rights of appellant——*"

Therefore, the embargo if valid, effective, and applicable, was a "taking" of property in violation of the Constitution for which the Government is liable. Tempel vs. U. S., 39 Sup. Ct. 56 at 59, and cases cited therein; U. S. vs. Gr. Falls Co., 112 U. S. 655; 5 Sup. Ct. 306; U. S. vs. Lynah, 188 U. S. 445; 23 Sup. Ct. 349.

As said by Mr. *Justice Holmes* in Portsmouth Harbor Land & Hotel Co. vs. United States, 43 Sup. Ct. 135; 242 U. S. 262: "If the acts amounted to a taking without assertion of an adverse right, a contract would be implied *whether it was thought of or not.*"

7. If perhap the Court should be of the opinion that the petition properly construed does allege that the Government's failure to perform its contract was

actually due to an embargo, then the appellant asks leave to be permitted to amend and to allege that the Government was not prohibited or prevented from performing the contract and shipping the silk on February 16 by an embargo.

On January 22, 1920, L. W. Baldwin, Regional Director, Allegheny Region, 135 Broad Street Station, Philadelphia, Pennsylvania, issued an embargo applying only to the Pennsylvania Railroad as follows:

> "Jan. 22, 1920 (391) 12:30 P. M.
>
> January twenty-second—Extra Penna. R. R. No. 50, covering carload freight for delivery at 37th Street Station, New York City; account accumulation, to cover all carload freight consigned, reconsigned or to be reconsigned for all consignees, except foodstuffs for human consumption, coal and newsprint paper. Embargoed freight will be allowed to come forward only when covered by permit to be issued by R. V. Ramsay, General Superintendent, New York City. Permits to be endorsed on bill of lading and waybill. This embargo also covers all freight simply billed "New York" or "Brooklyn" with no specific delivery shown. L. W. BALDWIN."

It does not embrace the B. & O. R. R.; it only covers carload freight delivered at 37th Street Station, and freight with no other specific designation.

It was never given preference or priority by the Interstate Comerce Commission as required by the Act of February 28, 1920; 41 Stat. L. 456, Sec. 1, par. 15.

There is no record to show that this embargo continued until February 16, or March 1, or that the occasion therefor lasted that long.

There was no other embargo applicable to Washington and New York shipments during January and February, 1920. The silk in issue which was to be shipped would not have made a third of a carload and it was shipped to a specific address and not to the 37th Street Station; in fact its designation was closer to the B. & O. and it was the proper road to route it over.

It seems on the law and facts that the petition is good, that it does state a cause of action, and that the demurrer should be overruled, while on the other hand the appellant is clearly entitled under the liberal rules of amendment to amend the petition and alleged that there was no embargo in effect in February, 1920, affecting shipment of the silk in issue, that there was no excuse for the Government failing to ship as it agreed.

Wherefore, the appellant insists that the judgment of the Court of Claims be reversed and the demurrer overruled with leave to amend, and the case remanded with costs.

Respectfully submitted,

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